

June 12, 2012

Deborah M. Cooke
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BOE Legal Department
P O Box 942879
Sacramento, CA 94279-0082

Re: Your Request for Advice
Our File No. A-12-093

Dear Ms. Cooke:

This letter responds to your request for advice on behalf of the Honorable Jerome E. Horton, Chairman of the Board of Equalization (the "BOE"), regarding the governmental mass mailing and "behested payment" reporting provisions of the Political Reform Act (the "Act").¹ Because your request for advice poses several specific questions that are highly fact-specific, we answer each question in turn after a statement of the Facts below.

FACTS

Your request concerns a free business conference, titled "Connecting Women to Power," scheduled for June 14, 2012, at CSU Dominguez Hills in Carson, California. This event is sponsored by the BOE via Chairman Horton and is cosponsored by the National Association of Women Business Owners of Los Angeles (NAWBO-LA) and Bridges Community Economic Development Corporation, which are both nonprofit organizations. BOE Vice-Chair Michelle Steel, the California Legislative Women's Caucus, and several other elected officials are participating in this event as invited guests. All of the other participating entities are nonprofit organizations or governmental entities. The event is free to the public to attend and free for agencies to participate. Chairman Horton and Vice-Chair Steel plan to attend the event. BOE's partial sponsorship and use of agency staff and resources for the business conference was approved by the Board at its February 2012 meeting.

You have enclosed a copy of a proposed flyer announcing the business conference. The flyer would be prepared by the BOE and mailed by the BOE via the United States Postal Service (USPS) to approximately 50,000 BOE permit holders and electronically mailed to approximately

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

80,000 BOE permit holders in the Third and Fourth Districts. The BOE also seeks to post the invitation on the BOE website and make paper copies available to the public for pick-up in the BOE district offices' lobbies in the Third and Fourth Districts. In addition, the BOE intends to e-mail electronic copies of the invite to local community partners to post on their websites and distribute via email.

The flyer to be mailed consists of two pages and contains the following pertinent parts: (1) At the center of the top of the first page is the BOE logo, with Mr. Horton's name and official title to the left and Ms. Steel's name and official title to the right; (2) Appearing immediately below the BOE logo and Mr. Horton's and Ms. Steel's names at the top of the first page is the word "and" followed by "Bridges Community Economic Development Corporation," "National Association of Women Business Owners, Los Angeles (NAWBO-LA)," and "California Legislative Women's Caucus"; this is followed by a general announcement of the business conference ("Connecting Women to Power Business Conference") and the date of the conference; (3) An asterisk (*) appears at the end of the list of co-sponsors and is referenced by another asterisk at the bottom right of the first page with the following statement: "Participating in this event as invited guests;" (4) At the bottom on the first page, in small print, are Mr. Horton's and Ms. Steel's names and district office addresses; (5) The remainder of the flyer, beginning on page one and continuing onto page two, generally states the time and location of the conference and other pertinent information, a list of featured speakers (none of whom are elected officers) and their topics, registration information, a list of specific invited attendees (most of whom are state or local elected officers), and a list (with logos) of organizations presumably donating toward the cost of the event.

You indicate that only Mr. Horton has coordinated in any way with the event's cosponsoring organizations in arranging the conference. Otherwise, other than presumably arranging details of their attendance, none of the other listed state or local elected officers (including Ms. Steel) have coordinated with either Mr. Horton or with the cosponsoring organizations in arranging the conference.

QUESTIONS, CONCLUSIONS and ANALYSIS

Question 1: Does the flyer comply with the governmental mass mailing provisions in Section 89001 and Regulation 18901, and therefore permit the two references to both Mr. Horton and Ms. Steel?

Conclusion: The flyer complies with the governmental mass mailing provisions in Section 89001 and Regulation 18901, and therefore the two references to both Mr. Horton and Ms. Steel are permissible.

Analysis: Section 89001 of the Act states: "No newsletter or other mass mailing shall be sent at public expense."

Regulation 18901(a) clarifies and elaborates on the requirements of Section 89001 as follows:

“(a) Except as provided in subdivision (b), a mailing is prohibited by section 89001 if all of the following criteria are met:

“(1) Any item sent is delivered, by any means, to the recipient at his or her residence, place of employment or business, or post office box. For purposes of this subdivision (a)(1), the item delivered to the recipient must be a tangible item, such as a videotape, record, or button, or a written document.

“(2) The item sent either:

“(A) Features an elected officer affiliated with the agency which produces or sends the mailing, or

“(B) Includes the name, office, photograph, or other reference to an elected officer affiliated with the agency which produces or sends the mailing, and is prepared or sent in cooperation, consultation, coordination, or concert with the elected officer.

“(3)(A) Any of the costs of distribution is paid for with public moneys; or

“(B) Costs of design, production, and printing exceeding \$ 50.00 are paid with public moneys, and the design, production, or printing is done with the intent of sending the item other than as permitted by this regulation.

“(4) More than two hundred substantially similar items are sent, in a single calendar month, excluding any item sent in response to an unsolicited request and any item described in subdivision (b).”

Thus, unless an exception applies, a state or local government agency cannot mail over 200 substantially similar items in a calendar month if the mailing either “features” or includes the name of an elected officer affiliated with that agency. Because the BOE is paying for production of this mailing and it contains the names of two of its elected board members, both at the top and bottom of the first page, the prohibition would therefore apply unless there is an exception. For purposes of this flyer, the mailing restrictions in Section 89001 do not apply to non-BOE elected officers listed because they are not affiliated with the BOE, nor was the mailing coordinated with them.

Regulation 18901(b) contains several exceptions. It appears that two of these exceptions are relevant to this flyer.

The first is the so-called “letterhead” exception set forth in Regulation 18901(b)(1)). This exception provides, among other things, that the 200-piece monthly limit does not apply if the elected officer’s name only appears in the letterhead or logotype of the stationery, forms and envelopes of the agency and the mailing does not otherwise contain a photograph, signature or other reference to the elected officer unless the additional reference is otherwise permitted under another exception.

The second is the “agency meeting” exception in Regulation 18901(b)(9)(A)2.² This exception permits an announcement of any meeting or event for which the agency is providing the use of its facilities, staff or other financial support so long as the announcement does not include the elected officer’s photograph or signature, and there is only a single mention of the elected officer’s name, unless otherwise permitted under another exception.

We note that the flyer does not contain a photograph or signature of either Mr. Horton or Ms. Steel, but does include two separate mentions of their names. However, under these exceptions, this is permissible if a separate exception can apply to each, and we believe this is the case here.

The use of Mr. Horton’s and Ms. Steel’s names at the top of the flyer’s first page, flanking the logo of the BOE, would qualify for the “agency meeting” exception in Regulation 18901(b)(9)(A)2. The BOE approved use of agency staff and resources for this event in February 2012. Furthermore, although we have construed this exception narrowly to apply to announcements sent by the agency rather than by individual elected officials in that agency (*Chin* Advice Letter, No. I-90-403), we nevertheless concluded in the *Kamp* Advice Letter, No. A-97-623a, that a mailing on behalf of an Equalization District qualifies as an action by the “agency” for purposes of this exception.³

Also, we think the printing of Mr. Horton’s and Ms. Steel’s names, along with their respective district office addresses, at the bottom of flyer’s first page would qualify for the “letterhead” exception in Regulation 18901(b)(1).

Question 2: Do Mr. Horton, or Ms. Steel and the other state or local elected officers listed in the event flyer as “invited guests,” have any “behested payment” reporting responsibilities as a result of expenditures by any government agency in connection with the conference, or as a result of expenditures by the private cosponsors in paying for the costs of the conference or sending the flyer?

Conclusion: Neither Mr. Horton, nor Ms. Steel nor any of the state or local elected officers listed in the flyer as invited guests, have behested payment reporting responsibilities as a result of any expenditures by government agencies in connection with the conference. Also, apart from Mr. Horton, neither Ms. Steel nor any of the other state or local elected officers listed in the flyer as invited guests have behested payment reporting responsibilities as a result of expenditures by the private cosponsors in paying for the costs of the conference or sending the flyer. However, because Mr. Horton is coordinating with the private cosponsors regarding the event, he will have behested payment reporting responsibilities for the private cosponsor’s expenditures if they reach the \$5,000 threshold discussed below.

² Because the flyer will be mailed or distributed to places outside Mr. Horton’s or Ms. Steel’s respective district, the “constituent meeting” exception in Regulation 18901(b)(9)(A)1 does not apply.

³ Since our application of this exception has been narrow, we would not, except in limited circumstances, apply the exception in Regulation 18901(b)(9)(A)2 to mailings on behalf of individual members of the Legislature.

Analysis: Section 82015(b)(2)(B)(iii) of the Act states that if an individual or entity, at the behest of an elected officer, makes monetary or in-kind donations totaling \$5,000 or more in a calendar year for a legislative, governmental or charitable purpose, that officer has to file a report detailing those donations with his or her public agency within 30 days after reaching the \$5,000 threshold and each 30 days thereafter for additional donations by the same donor.⁴ The report is filed on FPPC Form 803, entitled “Behested Payment Report.” Thus, since this is a conference related to governmental business, to the extent that a person makes donations or payments of \$5,000 or more towards the costs of publicizing or otherwise paying for the conference and no exception or other qualification applies, elected officers associated with the conference may be required to file behested payment reports.

Regulation 18215.3(c) provides that a payment behested⁵ by an elected officer and made by a local, state or federal government agency is not subject to reporting under Section 82015(b)(2)(B)(iii) so long as the payment is used in the course of official agency business. Because the business conference relates to issues before both the BOE and, presumably, before any of the other government agencies that may be devoting resources to the conference, it appears these payments would be for official agency business. Therefore, none of the expenditures by the BOE or any other government agency in producing, sending or distributing the flyer, or in the form of cash payments to vendors, cash payments or donations of goods or services to one of the non-profit cosponsors, or use of agency resources in connection with the business conference are subject to behested payment reporting by any of the elected officers involved in the conference.

As for expenditures in the form of cash payments or in-kind donations of goods or services by the business conference’s private cosponsors, because Mr. Horton is coordinating with the cosponsors in arranging the event, he will have behested payment reporting responsibilities for each private cosponsor that spends \$5,000 or more on goods or services provided toward the event. However, you indicate that, except for perhaps making scheduling arrangements for their attendance, none of the other elected officers involved with the conference, including Ms. Steel, have coordinated with the private cosponsors in arranging the conference and, as indicated on the flyer, are only invited as guests to the conference. As a consequence, none of these officers would have behested payment responsibilities for

⁴ Section 82015(b)(3) provides a similar requirement for members of the Public Utilities Commission.

⁵ Regulation 18215.3(a) defines “behest” for purposes of Section 82015(b)(2)(B)(iii) as “under the control or at the direction of, in cooperation, coordination, consultation, or concert with, at the request or suggestion of, or with the express, prior consent of” the elected officer. Note, however, that based on the language in Section 82015(b), we have consistently advised that behested payment reporting only applies to in-kind payments such as donations of goods or services or to payments made directly to a third party such as a non-profit organization helping to run an event or a vendor. If a payment for a legislative, governmental or charitable purpose is made directly to an elected officer or his or her agent such as a staffer in the official’s agency, it will be analyzed as either a direct campaign contribution to the elected officer under Section 82015(a) or a gift to the elected officer under Section 82028.

expenditures, including any expenditures for distributing the flyer, made by the non-government private cosponsors of the conference.

Question 3: Does the flyer, by itself, require an elected officer mentioned in the flyer to file a behested payment report if a donation of \$5,000 or more is made toward the conference in response to the flyer?

Conclusion: The content of the flyer does not solicit donations toward the conference. Therefore, none of the elected officers mentioned in the flyer, or heads of organizations of elected officers such as the Chair of the California Legislative Women's Caucus, would be responsible for filing a behested payment report if a donation of \$5,000 or more is made toward the conference just in response to the flyer.⁶

Analysis: As stated above, a behested payment report is only required under Section 82015(b)(2)(B)(iii) when there is a "behest" by an elected officer for a payment or donation for a legislative, governmental or charitable purpose. Regulation 18215.3(a) defines the term "behest" (see Footnote 5). Because the flyer does not contain any form of solicitation or request for donations or payments for the conference, donations or payments toward the conference strictly in response to the flyer would not be reportable behested payments.

Question 4: If an elected officer distributed the flyer with a cover letter asking for donations toward the conference, would that officer be required to file a behested payment report for the cost of the letter or reporting a donation of \$5,000 or more made toward the conference in response to the letter and flyer?

Conclusion: If the cost of producing the letter and of sending the letter and accompanying flyer was \$5,000 or more and the cost was paid by a person other than a government agency, that cost would be a reportable behested payment for the elected officer. Also, because the letter is soliciting donations or payments toward the conference, all donations of \$5,000 or more made in response to the letter would be reportable behested payments for the elected officer.

Analysis: As stated above, under Regulation 18215.3(c), payments for official agency business made by a government agency at the behest of an elected officer are not reportable behested payments. Therefore, to the extent a government agency pays for any solicitation of a donation or payment toward the event and the solicitation is signed or made by an elected officer, the cost of that solicitation is not a reportable behested payment. However, if the same solicitation is paid by a non-governmental entity, its cost would be a reportable behested payment if it was \$5,000 or more in value. Thus, the cost of producing and sending any solicitation letter signed by an elected officer and accompanying materials would be a reportable

⁶ You have also asked if the flyer, as defined in Regulation 18215.3(b), "features" any of the elected officers listed as invited guests. Since we conclude that the flyer does not solicit donations, we do not need to reach this question because the "features" issue only arises in the context of behested payment reporting when the communication is soliciting donations. (See Regulation 18215.3(b).)

behested payment if paid by a non-governmental entity and the cost was \$5,000 or more. In addition, because the letter is a solicitation by an elected officer, each donation or payment of \$5,000 or more made in response to the letter would be reportable by the elected officer as a behested payment.

Question 5: If an elected officer sends the solicitation letter discussed in Question 4 at the behest of Mr. Horton, does Mr. Horton have behested payment reporting responsibilities in connection with the letter?

Conclusion and Analysis: If an elected officer sends the solicitation letter discussed in Question 4 at the behest of Mr. Horton, Mr. Horton would have the same behested payment reporting responsibilities that the soliciting elected officer has for each donation of \$5,000 or more made in response to the solicitation. In addition, in the probably rare circumstance that the cost of preparing and sending the solicitation letter was \$5,000 or more, Mr. Horton would have to report the other elected officer's costs as a behested payment. However if Mr. Horton does not coordinate or otherwise request that the elected officer send the letter and accompanying flyer, Mr. Horton does not have behested payment reporting responsibilities in connection with the solicitation letter. (Section 82015(b)(2)(B)(iii) and Regulation 18215.3(a).)⁷

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Scott Hallabrin
Counsel, Legal Division

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⁷ This would also be true for any other state or local elected officers involved with the conference. If they request or coordinate with another person in sending a solicitation for donations, donations in response to the solicitations are reportable as behested payments if they reach the \$5,000 reporting threshold. However, absent a request or coordination, the mere inclusion of the elected officer's name in the flyer accompanying the solicitation does not constitute a "behest" for donations because the flyer itself does not contain a solicitation.